In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 756

HENRY DAVID ET UX, *Petitioners*

v.

ROBERT L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case was decided below on its particular facts. The petition for certiorari raises no legal issue of substance, but in essence asks this Court to re-evaluate the weight of the evidence. Accordingly, there is no basis for further review.

Milwhite Mud Sales Company (Mud Sales) had two stockholders: taxpayer and the Milwhite Company, Inc. (Milwhite). Each held 3000 shares. To facilitate the sale of Mud Sales, Milwhite gave taxpayer an op-

tion on its shares. A purchaser for the company was found in Mississippi River Fuel Corporation. It purchased 1000 shares from taxpayer. Desiring control of the company, it also purchased taxpayer's option on the Milwhite shares and exercised the option. Further, to ensure taxpayer's continued services and prevent him from setting up a competing business, Mississippi River, as part of the purchase contract with taxpayer, obtained from him a covenant not to compete. Since the purchase price for taxpayer's shares thus reflected not only the value of those shares but also the value of the option and covenant not to compete granted by taxpayer as part of the same transaction, the price received by taxpayer was, on a per-share basis, considerably higher than that received by Milwhite for its shares. The differential was $125 per share. Taxpayer, nevertheless, treated the entire sales price as attributable solely to the stock and reported it all as long-term capital gain. The Commissioner disallowed $125,000 of the total price, representing the amount received by taxpayer for his 1000 shares in Mud Sales in excess of that received by Milwhite. The Commissioner reasoned that this excess was properly attributable not to the value of the shares themselves, but to the covenant not to compete (taxable as ordinary income) and the assignment of the option (also taxable at ordinary income rates as short-term capital gain). Taxpayer paid the resulting deficiency and brought this action for a refund. The district court upheld the Commissioner, and the court of appeals affirmed.

Taxpayer's principal contention in this Court is that the Commissioner was required, but failed, to establish the amount of the purchase price of taxpayer's shares in Mud Sales that was in fact attributable to the covenant and to the option. This contention has no merit. In a refund suit the burden is upon the taxpayer to prove that he is entitled to a refund of a specific amount of improperly collected taxes (*Helvering* v. *Taylor*, 293 U.S. 507, 514; *Lewis* v. *Reynolds*, 284 U.S. 281, 283; Pet. 28-29), and taxpayer here made no effort to meet that burden. Nor is there any merit to taxpayer's further contention that the decision below is in conflict with *Annabelle Candy Co.* v. *Commissioner*, 314 F.2d 1 (C.A. 9). There it was held that the proper allocation of purchase price to a covenant not to compete depends upon whether the parties intended the covenant to be part of the total consideration. That was done by the courts below in the present case in finding that part of the purchase price was attributable to taxpayer's covenant not to compete with Mississippi River Fuel. See Pet. 26, 38.

Respectfully submitted.

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DECEMBER 1965.

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